

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

No. 33210

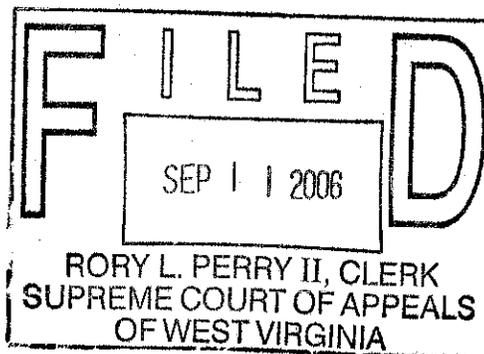
STATE OF WEST VIRGINIA EX REL.
DONALD DARLING,

Petitioner,

v.

DARRELL V. MCGRAW, ATTORNEY
GENERAL OF THE STATE OF
WEST VIRGINIA,

Respondent.



PETITION FOR WRIT OF MANDAMUS

Donald Darling
Petitioner pro se
State Bar No. 939

6790 Chaffee Court
Brecksville, OH 44141
(440) 838-0987

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PETITION FOR WRIT OF MANDAMUS

In support of his Petition for Writ of Mandamus, Donald Darling states as follows:

1. The petitioner, Donald Darling seeks relief in mandamus against the Respondent Darrell V. McGraw, Attorney General of the State of West Virginia to require payment of damages resulting from work-related injuries.

2. "Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." Syl. pt.1, *State ex rel. Allstate Ins.Co. v. Union Public Service Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966). "A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate

remedy." Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

3. Mr. Darling's right to payment arises under the West Virginia Workers' Compensation Act, W. Va. Code § 23-1-1 *et seq.* (Repl. Vol. 1998). The Respondent's nondiscretionary duty to pay damages arises also from the Workers' Compensation Act.

4. Mr. Darling's work-related injuries were determined by the Workers' Compensation Division to constitute a mental-mental claim under W. Va. Code § 23-4-1f. That provision prevents payment of benefits for mental-mental claims from the workers' compensation fund.

5. However, W. Va Code § 23-4-1f does not exclude Mr. Darling's claim from the no-fault dispute resolution process created by the Workers' Compensation Act. Exclusion from the no-fault dispute resolution process occurs only when an employer's immunity from common law tort actions is expressly provided under the Workers' Compensation Act. See W. Va. Code § 23-4-2(c)(1) (1994) (Repl. Vol. 1998).

6. W. Va. Code § 23-4-1f, through its omission of express language removing an employer's immunity, shifts the cost for damages for mental-mental claims to the employer.

7. Beginning in October, 1991, Mr. Darling became an employee of the Attorney General of West Virginia. His employment was continuous from 1992 through 2002.

8. Mr. Darling suffered extreme and prolonged stress in the course of and resulting from his employment. As a result of that stress he received bodily injuries consisting of chronic depression and severe, frequent migraine headaches. His injuries forced him to stop working on April 9, 2003. Subsequently, he formally resigned his employment on July 1, 2002.

9. Mr. Darling's injuries were of such severity that during 2002 he was declared totally and permanently disabled by both the Social Security Administration and the West

Virginia Consolidated Public Retirement Board. His status as totally and permanently disabled continues to this day unabated. Both agencies found his injuries disabling on the basis of the initial application.

10. Mr. Darling's injuries manifests as follows: (a) severe and chronic depression - chronic body pain, sleep disruption, feelings of hopelessness and despair, weight gain, sexual dysfunction, and inability to concentrate or complete tasks; and (b) frequent and severe migraine pain with accompanying nausea, vomiting, light and sound sensitivity, and post-episodic fatigue.

11. Mr. Darling remains on a regimen of medications for both injuries: Lexapro, Wellbutrin, Ambien, and Ativan for depression; Imitrex, Midrin, Topamax, and Phenergan for migraines.

12. Mr. Darling began the application process for workers' compensation benefits on April 23, 2002, by completing Section I of form WC-123, Report of Occupational Injury. Subsequently, his treating physician, Dr. Mark Casdorff, a board certified psychiatrist, completed Section II and on May 15, 2002, Section III was submitted to the Respondent where it was completed and forwarded to the Workers' Compensation Division. A copy of form WC-123 is in the Addendum of Documents as Exhibit A..

13. By decision dated June 26, 2002, the Workers' Compensation Division denied the claim for benefits. The Division determination that the injuries constituted a mental-mental claim under W. Va. Code § 23-4-1f. A copy of the June 26, 2002 decision is in the Addendum of Documents. That decision was appealed first to the Office of Judges and then to the Workers' Compensation Appeal Board. These administrative tribunals affirmed the original decision on June 24, 2003 and June 7, 2004 respectively. No judicial review was pursued. A copy of the June 26, 2002 Decision is in the Addendum of Documents as Exhibit B.

14. The Division denied the claim solely on the grounds that it was a mental-mental claim. No other grounds for disqualification were cited. Additionally, the Respondent did not object to the claim and took no active part in the administrative

appeals process. In fact, in completing the Employer's Report form associated with Mr. Darling's application for a disability pension from the West Virginia Consolidated Public Retirement Board, Managing Deputy Attorney Frances Hughes answered the following question thusly: "In your opinion is the accident/sickness of individual work related? X Yes No." A copy is in the Addendum of Documents as Exhibit C.

15. On October 22, 2004, in reliance on the statutory grounds, *supra*, Mr. Darling made a claim for direct payment from Respondent by letter to Charles E. Jones, Executive Director of the West Virginia Board of Risk and Insurance Management (BRIM). Review of the State insurance policy, Policy Number RMGL 612-45-93, in effect from July, 2001 to July 1, 2002 indicates that COVERAGE D STOP GAP LIABILITY INSURANCE provided coverage for the circumstance of Mr. Darling's injuries. Copy of pertinent policy provisions is included in Addendum of Documents as Exhibit D.

16. Mr. Darling's claim was transmitted by BRIM to the State's insurance carrier, National Union Fire Insurance Company (NUFI). In the following months, Mr. Darling and NUFI debated whether his injuries were covered by the policy's stop gap coverage. Eventually, NUFI denied coverage, reasoning there was no legal obligation to pay damages, i.e. no court had ruled for or against the interpretation of the Workers' Compensation Act relied on by Mr. Darling.

17. Attempting to obtain a judicial determination that the Respondent is legally obligated to pay damages for his work-related injuries, Mr. Darling, on June 25, 2004 instituted a declaratory judgment action NUFI in the Circuit Court of Kanawha County, West Virginia (Darling v. National Union Fire Insurance Company, Civil Action No. 04-C-1829.)

18. NUFI removed the case to the United States District Court for the Southern District of West Virginia on August 6, 2004. On November 23, 2005, the District Court dismissed the suit without prejudice. Essentially, the District Court indicated a state court decision finding a legal obligation on the part of the Respondent to pay damages was

necessary before the coverage issue could be resolved. A copy of the Memorandum Opinion and Order included in Addendum of Documents as Exhibit E.

Wherefore, the Petitioner requests that a writ of mandamus issue requiring the Respondent to fulfill the nondiscretionary legal duty to pay damages for the Petitioner's work-related injuries.

Respectively submitted,

A handwritten signature in cursive script, appearing to read "Donald Darling", written over a horizontal line.

Donald Darling

Petitioner Pro se
State Bar No. 939
6790 Chaffee Court
Brecksville, OH 44141
(440) 838-0987

VERIFICATION

I, Donald Darling, do hereby affirm that the allegations in the foregoing Petition for Writ of Mandamus are true, except where they are stated to be on information or belief they a believed to be true.

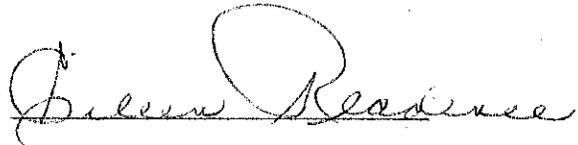
Given under my hand this 8th day of September.2006.


Donald Darling

STATE OF OHIO;

COUNTY OF CUYAHOGA, to wit:

Taken, subscribed, and sworn to before the undersigned notary public on the 8th day of September, 2006.



NOTARY PUBLIC

EILEEN READENCE Notary Public
State of Ohio, Cuyahoga County
My Commission Expires Nov. 19, 2008

My commission expires _____.

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Respondent.

ADDENDUM OF DOCUMENTS

Donald L. Darling
Petitioner pro se
State Bar No. 939

6790 Chaffee Court
Brecksville, OH 44141
(440) 838-0987

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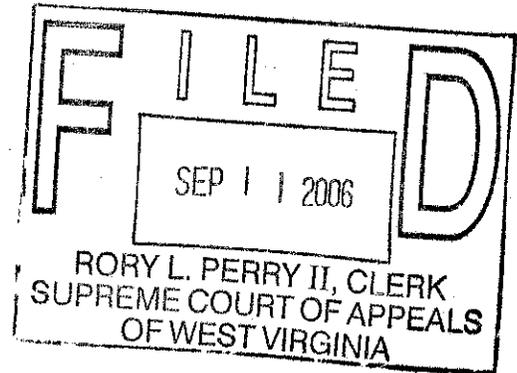
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**MEMORANDUM OF LAW
IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

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**MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

INTRODUCTION

The purpose of the writ of mandamus is clearly established. "Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Union Public Service Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966). Equally well established are the necessary prerequisites to obtain relief. "A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

The Petitioner, Donald Darling, seeks a writ of mandamus requiring the Respondent, Darrell V. McGraw, Jr., Attorney General of West Virginia, to pay damages for work-related injuries. Mr. Darling's right to payment arises under the West Virginia Workers' Compensation Act. Attorney General McGraw's duty to pay damages also arises under the Workers' Compensation Act. Mandamus is the only remedy available to compel the execution of a statutory duty.

The State of West Virginia and allof its employees are required to be covered by and included in the workers' compensation system. The keystone of that system is an employer's immunity from common law tort actions. In return the employee is guaranteed prompt payment. To effectuate this *quid pro quo*, the Workers' Compensation Act establishes a no-fault dispute resolution process. Normally, benefits are paid from the works' compensation fund. However, there is one statutorily created circumstance where the employer is directly responsible to pay damages.

Mr. Darling's injuries are of the particular nature for which an employer has direct financial responsibility to pay damages. The employer's duty flows from the legislature's cost-shifting from the workers' compensation fund to the employer the responsibility to pay damages. This was accomplished with the enactment of W. Va. Code § 23-4-1(f) (1993) (Repl. Vol. 1998). This statute prevents payment from the workers' compensation fund for so-called mental-mental claims. However the legislature did not remove the employer's immunity from common law tort actions. Therefore, mental-mental claims remain in the no-fault dispute resolution process. Only financial responsibility is affected. When the Workers' Compensation Division determined Mr. Darling's injuries to be a mental-mental claim (but not otherwise disqualified on any jurisdictional issue) the duty of the employer to directly pay damages became fixed.

FACTS

The Petitioner Donald Darling, while an employee of the Respondant, experienced extreme stress caused by his employment. Mr. Darling was subject to extreme stress in the workplace over an extended period of time. The extreme stress caused bodily injuries in the form of chronic and severe depression manifesting in e.g. fatigue, sleep disruption, pain feelings of hopelessness and despair, weight gain and sexual dysfunction. Additionally, the workplace stress triggered frequent and severe migraine headaches with accompanying nausea, vomiting, sound sensitivity and light sensitivity. These injuries were of such severity that Mr. Darling was declared permanently and totally disabled by both the Social Security Administration and the West Virginia Consolidated Public Retirement Board.

Mr. Darling's injuries forced him to stop working on April 9, 2002.¹ He applied for Workers' Compensation benefits on April 23, 2002, by completing Section I of form WC-123, Report of Occupational Injury. (Addendum of Documents, Exhibit A) Subsequently, his treating physician, Mark Casdorff, D.O., a board certified psychiatrist, completed Section II. Thereafter, on May 15, 2002, the employer completed Section III and forwarded the form to the Workers' Compensation Division.² The Respondent did

¹ This Court has held that the date of injury determines the applicable law in a workers' compensation. "[T]he employee's application for such compensation is governed by the statutory, regulatory, and common law as it existed on the date of the employee's injury..." Syl. Pt. 8, *in part, State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). All statutory references are to those in effect on April 9, 2002, the date of Mr. Darling's injuries.

² Effective October 1, 2003, the "workers compensation division of the bureau of employment programs" was redesignated the "workers' compensation commission, an agency of the state." See, W. Va. Code § 23-1-1 (2003). Since this matter is controlled by statutory and case law in effect in 2002, the governmental units will be referred to using their pre-October, 2003 names in order to be consistent with the statutes in effect when the claim arose.

not contest the claim or any of the elements involved, including causation.³

The Division considered the information submitted by Mr. Darling and issued a decision dated June 26, 2002, denying his claim for benefits. (Addendum of Documents, Exhibit B) The denial was based on the Division's determination that Mr. Darling's injuries constituted a so-called mental-mental claim and with a physical injury or disease.⁴ The payment of benefits by the Division for mental-mental claims from the workers' compensation fund⁵ is prohibited by W. Va. Code § 23-4-1f (1993) (Repl. Vol. 1998):

For the purposes of this chapter, no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this section.

Mr. Darling appealed this decision first to the Office of Judges and then to the Workers' Compensation Appeal Board. Both administrative tribunals affirmed the original decision. The Offices of Judges on June 24, 2003. The Appeal Board on June 7, 2004. The decision of the Workers' Compensation Appeal Board exhausted the available administrative remedies. Mr. Darling did not seek judicial review pursuant to W. Va. Code § 23-5-15 (1995) (Repl. Vol. 1998).

Resigned to the condition that the Workers' Compensation Division would not

³Managing Deputy Attorney Frances Hughes, in completing the Employer's Report form associated with Mr. Darling's application for a disability pension from the West Virginia Consolidated Public Retirement Board, answered the following question thusly: "In your opinion is this accident/sickness of individual work related? X Yes ___ No." (Addendum of Documents, Exhibit C)

⁴The Division has never defined "physical injury or disease". Further, no regulation has been promulgated setting forth any standard for diagnosing a physical injury or disease that is caused solely by a nonphysical means. Absent a bright line standard, the Division is free to reject any mental-mental claim as not being a physical injury. Mr. Darling's claim illustrates this point. If his symptoms had been caused by exposure to a toxic material, there would be no doubt that his injuries are a physical injury or disease. The door to abuse stands wide open.

⁵The workers' compensation fund is established in W. Va. Code § 23-3-1 (1995) (Repl. Vol. 1998).

relent in its determination, Mr. Darling, on the grounds set forth, *infra*, made an initial claim against the State's insurance policy on October 26, 2004. (Relevant portions of policy in Addendum of Documents, Exhibit D) That claim was filed with Charles E. Jones, Executive Director of the West Virginia Board of Risk and Insurance Management ("BRIM").

Mr. Darling's claim was transmitted by BRIM to the State's insurance carrier, National Union Fire Insurance Company (NUFI). In the following weeks and months Mr. Darling and NUFI corresponded and debated whether his injuries were covered by the policy's stop gap coverage. Eventually, NUFI denied coverage, reasoning there was no legal obligation to pay damages, i.e., no court had ruled for or against the interpretation of the Workers' Compensation Act relied on by Mr. Darling

In an attempt to obtain a judicial determination that the Respondent is legally obligated to pay damages for his work related injuries, Mr. Darling, on June 25, 2004, instituted a declaratory judgment action against NUFI in the Circuit Court of Kanawha County, West Virginia, seeking a determination of his rights under the policy.⁶ NUFI removed the case to the United States District Court for the Southern District of West Virginia on or about August 6, 2004. On November 23, 2005, the District Court dismissed the suit without prejudice. (Addendum of Documents, Exhibit E) Essentially, the District Court indicated a state court decision finding a legal obligation on the part of Mr. Darling employer to pay damages was necessary before the coverage issue could be resolved. Memorandum Opinion and Order attached in Appendix.

ARGUMENT

This petition concerns the interpretation of a statute. The principles of statutory interpretation provide the appropriate beginning point. In *State ex el McGraw v. Coombs Services*, 206 W.Va. 512, at 518 and 519, 526 S.E.2d 32 (1999), Justice Davis

⁶ Darling v. National Union Fire Insurance, Civil Action No. 04-C-1829.

summarizes the West Virginia law of statutory construction:

When interpreting statutes promulgated by the Legislature, we first discern the objective. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature" Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975), Syl. Pt. 6, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E. 176 (1999). In gleaning legislative intent, we endeavor to construe the scrutinized provision consistently with the purpose of the general body of law of which it forms a part.

"Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.' Syllabus Point 3, *Smith v. State Workmen's Compensation Comm'r.*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syllabus point 3, *Boley v. Miller*, 187 W.Va. 242, 418 S.E.2d 352 (1992).

Syl. Pt. 3, *Rollyson v. Jordan*, 205 W.Va. 368, 518 S.E.2d 372 (1999). See also Syl. Pt. 4, in part, *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997) ("In ascertaining legislative intent effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation")(Internal quotations and citations omitted), Syl. Pt. 2, in part, *Mills v. Van Kirk*, 192 W.Va. 695, 453 S.E.2d 678 (1994)("To determine the true intent of the legislature, courts are to examine the statute in its entirety, and not select 'any single part, provision, section, sentence, phrase or word' Syllabus Point 3, in part, *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990)").

The effort to maintain consistency among related statutes is particularly important as legislators normally are charged with knowledge of the law in effect at the time of a statute's enactment or amendment. In this regard, [w]e may 'assume that our elected representatives...know the law.'" *State ex rel. Smith v. Maynard*, 193 W.Va. 1, 8-9, 454 S.E.2d 46, 53-54 (9194) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 158, 60 L.Ed. 560, 576 (1979)), *overruling on other grounds recognized by State ex rel. Mitchem v. Kirkpatrick*, 199 W.Va. 501, 485 S.E.2d 445 (1997)(per curiam). See also *State v. Hosea*, 199 W.Va. 62, 68 n.15, 483 S.E.2d 62, 68 n. 15 (1996) ("[W]e assume that elected representatives know the law at the time of any amendment to a statute....").

Furthermore, it is customary to treat a statutory amendment as if the amendatory language had been incorporated in the original enactment. "Ordinarily where an amendment has been adopted to a comprehensive legislative act covering a particular subject, in construing the act thereafter it will be read as

if the amendment had been in it from the beginning." Syl. Pt. 1, *State v. Sine*, 91 W.Va. 608, 114 S.E. 150 (1922). Accord Syl. Pt. 5, *State v. Vendetta*, 86 W.Va. 186, 103 S.E. 53 (1929) ("An amendment to a statute should generally be construed as if it had been included in the original act.").

Once the legislative intent underlying a particular statute has been ascertained, we proceed to consider the precise language thereof. "A statute that is ambiguous must be construed before it can be applied." Syllabus Point 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992)." Syl. pt. 7, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176. See also Syl. Pt. 1, in part, *Ohio County Comm'n. v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted is the statute is ambiguous..."). However, [w]here the language of a statutory provision is plain, its terms should be applied as written and not construed." *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999)(citations omitted). See also, Syl. Pt. 4, in part, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W.Va. 51, 494 S.E.2d 543 (1999) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." (Internal quotations and citations omitted)): Syl. pt. 5, in part, *Walker v. West Virginia Ethics Comm'n.*, 201 W.Va. 108, 492 S.E.2d 167 ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the ruled of interpretation." (Internal quotations and citations omitted)).

Applying these principles to W. Va. Code § 23-4-1f (1993)(Repl. Vol. 1998) and related provision of the Workers' Compensation Act reveals that the Respondent has a legal obligation to pay damages for his work-related injuries.

The legislative intent of the West Virginia Worker's Compensation Act, W. Va. Code § 23-1-1 *et seq.* (Repl. Vol 1998) is clear. The enactment is the manifestation of an important public policy. Indeed, the legislature makes this forceful statement in W. Va. Code §23-4-2(c)(1) (1994) (Repl. Vol. 1998):

It is declared that enactment of this chapter and the establishment of the workers; compensation system in this chapter was and *is intended to remove from the common law tort system all disputes* between or among employers and employees regarding the compensation to be received for injury or death to an employee *except as herein expressly provided*, and to establish a system which compensates even though the injury or death of an employee may be caused by his or her own fault or the fault of a co-employee: *that the immunity established in*

sections six and six-a [§§ 23-2-6 and 23-2-6a] Article two of this chapter, *is an essential aspect* of this workers' compensation system; that the intent of the Legislature in providing immunity from common-law suit was and is to protect those immunized from litigation outside the workers' compensation system *except as here in expressly provided...* (emphasis supplied).

The foregoing shows that the intent of the workers' compensation system is to remove from the common law tort system all disputes between employer and employee all disputes for damages from work-related injuries. To accomplish this intent a no-fault dispute resolution system is established. The system is intended to be exclusive. Moreover, the keystone of the system is the immunity from suit granted to employers.

An employer's immunity from suit is established in W. Va. Code § 23-2-6 (1991) (Repl. Vol. 1998), which provides in pertinent part:

Any employer subject to this chapter who shall subscribe and pay into the workers' compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided shall not be liable to respond in damages as common law or by statute for the injury or death of an employee, however occurring, after so subscribing or electing, and during any period in which such employer shall not be in default in the payment of such premiums or direct payments and shall have complied fully with all other provisions in this chapter.

This statute is also known as the exclusivity provision.

In *State ex rel. Abraham Linc v. Bedell*, 216 W.Va. 99, 602 S.E.2d 524, 546-547 (2000) (per curiam), the Court describes the important principles underlying the workers' compensation system and the scope of the exclusivity provision:

"The Workmen's Compensation Act was designed to remove negligently caused industrial accidents from the common law tort system." *Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 700, 246 S.E.2d 907, 911 (1978), *superseded by statute as stated in Handley v. Union Carbide Corp.*, 804 F.2d 265, 269 (4th Cir. 1986). "The benefits of this system accrue both to the employer, who is relieved from common-law tort liability for negligently inflicted injuries, and to the employee, who is assured prompt payment of benefits." *Meadows v. Lewis*, 172

W.Va. 457, 469, 307 S.E.2d 625, 638 (1983); see also *Persinger v. Peabody Co.*, 196 W.Va. 707, 713, 474 S.E.2d 887,893 (1996). *State ex rel. Abraham Linc. Corp.*, 216 W.Va. 99, 602 S.E.2d at 546. [In footnote seven the court stated: **"That philosophy has commonly been described as a quid pro quo on both sides: in return for the purchase of insurance against job-related injuries, the employer receives tort immunity; in return for giving up the right to sue the employer, the employee receives swift and sure benefits."** *Dominion Caisson Corp. v. Clark*, 614 A.2d 529, 532-33 (D.C. 1992) quoting *Meiggs v. Associated Builders*, 545 A.2d 631, 634 (D.C. 1988), *cert. denied*, 490 U.S. 1116, 109 S.Ct. 3178, 104 L.Ed. 1040 (1989).

As this court succinctly stated in *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998), "[when an employer subscribes to and pays premiums in the Fund and complies with all other requirements of the Act, the employer is entitled to immunity for any injury occurring to an employee and shall not be liable to respond in damages at common law or by statute.' W. Va. Code 23-2-6 [1991]." Footnote eleven of *Frazier* explained: The statute is also known as the 'exclusivity' provision, as it makes workers' compensation benefits the exclusive remedy for personal injuries sustained by an employee injured in the course of and resulting from his or her covered employment." *Id.* at 659 n. 11, 510 S.E.2d at 493, n. 11.

The immunity provided by § 23-2-6 is not easily forfeited. As the District Court for the Southern District of West Virginia explained in *Smith v. Monsanto Co.*, 882 F.Supp. 327 (S.D.W.Va. 1992), "[u]nder the Act, an employer who is otherwise entitled to immunity under § 23-2-6 may lose immunity in only one of two ways: (1) By defaulting in payments required by the Act or otherwise failing to comply with the provisions of the Act, or (2) By deliberately intending to produce injury or death to the employee." 822 F.Supp. at 330 (citation omitted).

State ex rel. Abraham Linc Corp., 216 W.Va. 99, 602 S.E.2d 524, 546-547 (2004) (per curiam).

The exclusivity and immunity established in the Workers' Compensation Act are not absolute. There are exceptions. However, the Workers' Compensation Act requires that the claim for damages by an injured employee against his or her employer is included in the no-fault resolution system **except "...as herein expressly provided."** W. Va. Code § 23-4-2 (1994) (Repl. Vol. 1998).

As the Court noted above in quoting *Smith v. Monsanto Co.*, 822 F.Supp. 327 (S.D.W.Va. 1992), the immunity provided by W. Va. Code § 23-2-6 (1991) (Repl. Vol. 1998) is not easily forfeited and recognizes only two circumstances which can result in stripping an employer's immunity.

The two statutory provisions under which an employer's immunity from suit may be abrogated are crafted in the express and direct language required by W. Va. §23-4-2(c)(1) (1994) (Repl. Vol. 1998). The first, W. Va. Code § 23-4-2(c)(2) (1994) (Repl. Vol. 1998), strips an employer's immunity for acting with deliberate intention to harm the employee and states in pertinent part:

The immunity from suit provided under this section and under six-a [§ 23-2-6(a)], may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention."

Likewise, W. Va. Code § 23-2-8 (1999) (Repl. Vol. 1998) specifically strips immunity from an employer for failure to pay premiums:

All employers required by this chapter to subscribe to and pay premiums into the workers' compensation fund, *except the state of West Virginia*⁷, the governmental agencies or departments created by , and municipalities and political subdivisions of the state, and who do not subscribe to and pay premiums in to the workers' compensation as required by this chapter and have not elected to pay individually and directly or from benefit funds compensation and expenses to injured employees or fatally injured employees' dependents under the provisions of section nine [§ 23-2-9] of this article, or having so subscribed or elected, shall be in default in the payment of the same, or not having otherwise fully complied with the provisions of section five or section nine [§ 23-2-3 or § 23-2-9] of this article, shall be liable to their employee (within the meaning of this article) for all damages suffered by reason of personal injuries sustained in the course of employment caused by wrongful act, neglect or default of the employer or any of the employer's officers, agents or employer's officers, agents or employees while acting with the scope of their employment and in the course of their employment

⁷ By this provision the State of West Virginia can never lose its immunity for nonpayment of premium.

and also to the personal representatives of such employees where death results from such personal injuries, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common-law defenses: The defense of the fellow-servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of some one whose duties are prescribed: Provided, that such provision depriving a defendant employer of certain common-law defenses under the circumstances therein set forth shall not apply to an action brought by a county court [county commission', board of education, municipality, or other political subdivision of the state or against any employer not required to cover his employees under the provisions of this chapter. (Emphasis supplied).

Does W. Va. Code § 23-4-1f (1993) (Repl. Vol. 1998), the so-called mental-mental claim provision, expressly forfeit the employer's immunity from suit as do W. Va. Code § 23-2-8 and §23-4-2(c)(2)? The answer is no. Removing the employer's immunity from suit is never mentioned:

For the purposes of this chapter, no alleged injury or disease shall be recognized as a compensable injury or disease to which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this section.

The employer's immunity from suit is never addressed. The legislature is deemed to have knowledge of the requirement that removal of immunity must be done with express language. The statute lacks the requisite express language. In order to exclude mental-mental claims from coverage under the workers' compensation system, the employer's must be expressly removed in a manner similar to W. Va. Code § 23-4-2(c)(2) and 23-2-8. Accordingly, the employer retains immunity. The dispute remains in the exclusive, no fault system,

What W. Va. Code § 23-4-1f does is shift the costs for so called mental-mental

claims from the workers' compensation fund to the employer⁸. The failure to abrogate employer immunity keeps the claim within the no fault resolution system which is the corner stone of the workers' compensation system. If an employee is barred by employer immunity from bringing a common-law action, then the employee is entitled, under the Workers' Compensation Act, to have his claim resolved in the no fault system. The language of the statute stating mental-mental claims "are not compensable", absent abrogation of employer immunity, merely excludes payment from the workers' compensation fund. However, the language does not exclude the employer from financial responsibility for his injured employee's damages.

The foregoing is further supported by the rule of liberality of interpretation applicable to the Workers' Compensation Act. See *Dunlap v. State Workers' Comp. Comm.*, 160 W. Va. 58, 232 She'd 343 (1977). (The Workers' Compensation Act is remedial in nature and should be liberal construed in favor of the injured workman.) *Hughes v. State Workmen's Comp. Commission*, 156 W.Va. 146, 191 S.E.2d 606 (1972). (The Workmen's Compensation statute is remedial in nature and must be given a liberal interpretation in order that the beneficent purposes may not be defeated by a strict construction of its terms.) In light of this precept and the statute's own requirement for express language to remove either employer or employee from the protection afforded by the no fault system, W. Va. Code § 23-4-1f must be given the strictest scrutiny and be afforded a presumption that coverage for mental-mental claims remains within the no fault system.

In this case, the Respondent is legally obligated to pay damages to Mr. Darling for injuries he suffered in the course of and resulting from his employment. That legal obligation arises from the legislature's enactment of W. Va. Code § 23-4-1f and the resultant cost shifting to the employer to fund payment of damages to injured employee.

⁸ The common wisdom is that the legislature always acts to place the burden of cost-saving measures on the employee. However, the employer is equally susceptible to having that burden placed on its shoulders.

Payment of damages presents no additional financial burden. The State of West Virginia has insurance protection⁹ seemingly tailored for this very circumstance. The stop gap coverage of the general liability coverage provides a mechanism to fund this statutorily imposed cost.

This Court has described the general nature of stop gap liability insurance:

In many states, insurance companies offer business three types of insurance coverage: commercial general liability coverage; workers' compensation coverage; and "stop gap" employers coverage. A commercial general liability policy protects a business against numerous kinds of liability claims, but it is generally accepted that the standard policy does not provide coverage for any claim brought by an employee against his or her employer arising out of the employment.

On the opposite end of the spectrum is coverage specifically for employee claims against an employer which are compensable under a state's workers' compensation laws. In many states, coverage for workers' compensation claims is provided by public insurance companies; in West Virginia, coverage is primarily provided through the West Virginia Workers' Compensation Fund, a government-controlled insurance. *See West Virginia Code § 23-1-1 et seq.* Workers' compensation coverage is designed to release both an employer and its employees from common-law rules of liability and damage, protect an employer from expensive and unpredictable litigation, and provide compensation for injuries to employees without the burdensome requirements of proving common-law negligence *Jones v. Laird Foundation, Inc.*, 156 W.Va. 479, 489, 195 S.E.2d 821, 827 (19--) (Sprouse , J. concurring).

Between these two types of protection lies a "gap" in coverage. In this gap are claims made against a business by injured employees whose claims are not generally compensable under the workers' compensation. An "employers' liability" policy therefore exists to "fill the gaps" between workers' compensation coverage and an employer's general liability coverage

Erie Ins. Prop. & Cas. Company v. Stage Show Pizza, 210 W. Va. 63m 67-68, 553 S.E.2d 257m 261 (2001).

⁹ The pertinent provisions of the policy, i.e. General Liability Policy GL 612-45-93, are included in the Appendix of Documents.

The State of West Virginia is required by law to participate in the workers' compensation system and its employees are, likewise, included in the system.¹⁰ The State of West Virginia also has stop gap liability insurance to cover damage claims of injured employees not compensable from the fund established under the West Virginia Workers' Compensation Act. The pertinent portion states:

COVERAGE D. STOP GAP LIABILITY INSURANCE

1. The company will pay on behalf of the insured all sums which the "insured" shall become legally obligated to pay as damages because of "bodily injury" to which this insurance applies, caused by an "occurrence" to any employee of the insured whose remuneration has been reported and declared under "Workers' Compensation Law" of the State of West Virginia and has been injured in the course of his employment, but is not entitled to receive (or elects not accept) the benefits provided by the aforementioned law...

5. Extensions of coverage

The insurance afforded by this coverage is extended to include damages for which the insured is liable under Section 23-4-2 of the West Virginia Compensation Act.¹¹

Other than the legal obligation to pay damages, the policy has five additional conditions for coverage to attach.

- There must be a bodily injury.
- Caused by an occurrence.
- To any employee of the insured whose remuneration has been reported and declared under workers' compensation laws of the State of West Virginia.
- Who has been injured in the course of his employment.

¹⁰ See W. Va. Code § 23-2-1(a) (1995) (Repl. Vol. 1998). Further, employees of the State of West Virginia are made subject to the Workers' Compensation Act. See W. Va. Code § 23-2-1(a)(2) (Repl. Vol. 1998, pocket-part supplement).

¹¹ The policy's direct reference to W. Va. Code § 23-4-2 (1994) (Repl. Vol. 1998) is of great moment. Both the no-fault resolution process and the requirement that immunity is lost only as specifically provided are contained therein.

- But is not entitled to receive (or elects not to accept) the benefits provided by the aforementioned law.

Each is readily met in this case.

Mr. Darling remains under a doctor's care for both the severe depression and frequent and severe migraines¹². These conditions are of such magnitude that Mr. Darling has been declared permanently and totally disabled by the Social Security Administration and the West Virginia Consolidated Public Retirement Board. Both agencies made their decisions on the basis of the initial application. Mr. Darling is on a regimen of medication for both conditions. Lexapro, Wellbutrin, Ambien, and Ativan for depression. Imitrex, Midrin, Topamax, and Phenergan for migraines. In the policy, "'bodily injury' means bodily injury, sickness, or disease sustained by any person..." Clearly, Mr. Darling's injuries constitute a bodily injury within the meaning of the stop gap insurance coverage.¹³

Additionally, the policy defines "occurrence" to mean "...an accident, including continuous or repeated exposure to conditions which results in 'bodily injury' or 'property damage' neither expected nor intended from the standpoint of the 'insured.'" Once a work-related bodily injury has been documented, the definition of occurrence has been met.

At the time of his injuries, Mr. Darling was an employee of the insured, the State of West Virginia, Office of the Attorney General. The State is required to participate in the workers' compensation system. See W. Va Code § 23-2-1(a). Further, employees of the State of West Virginia are specifically designated as employees subject to Workers' Compensation Act. See W. Va Code § 23-2-1a.. As a result, the State of West Virginia has a statutory duty to declare and report Mr. Darling's remuneration to the Workers'

¹² The *Merk Manual of Medical Information, Home Edition, 1997*, Merk & Co. at page 296, defines migraine headaches as follows: "A migraine headache is a recurring, throbbing, intense pain that usually affects one side of the head but sometimes both sides; the pain begins suddenly and may be preceded or accompanied by visual, neurological, or gastrointestinal symptoms."

¹³ The Workers' Compensation Division denied the claim solely on the basis of W. Va. Code § 23-4-1f (1993). Whether Mr. Darling's injuries are "personal injuries" under W. Va. Code § 23-4-1 (1989) (Repl. Vol. 1993) was never at issue.

Compensation Division.

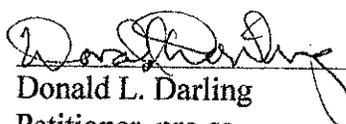
Mr. Darling was injured in the course of his employment. This fact is shown by Form WC-123, Report of Occupational Injury. Mr. Darling stated in the WC-123 that his injuries occurred in the course of his employment. Likewise, his treating physician, Dr. Casdorff, attributed his injuries as being due to his employment (WC-123, Section II, Item 4). The Respondent, in Section III of the WC-123, did not dispute that the injuries were due to employment. Moreover, in the Employer's Report Form to the West Virginia Consolidated Public Retirement Board, the employer answered yes to this question: "In your opinion is the accident/sickness of the individual work related."

The final policy condition is established by the Workers' Compensation Division. The June 26, 2002 decision denying the claim (and affirming of that decision in the administrative appeal process) establishes that Mr. Darling is not entitled to benefits paid from the workers' compensation fund. Mr. Darling is, accordingly, entitled to payment from the Respondent through the mechanism created by the stop gap insurance coverage.

CONCLUSION

On the basis of the foregoing, the Petitioner request that a writ of mandamus be issued.

Respectively submitted,


Donald L. Darling
Petitioner, pro se
State Bar No. 939

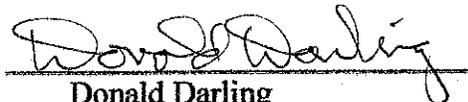
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CERTIFICATE OF SERVICE

I, Donald Darling, the undersigned Petitioner pro se, hereby certifies that a true copies of the foregoing Petition for Writ of Mandamus, Appendix of Documents, and Memorandum of Law in Support of Petition for Mandamus were served on the Respondent:

Darrell V. McGraw, Jr.
Attorney General of West Virginia
West Virginia State Capitol
Building 1, Room E-26
Charleston, WV 25305

by United States Mail, postage pre-paid, this 8th day of September, 2006.


Donald Darling
Petitioner pro se